

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
RENO, NEVADA

LARRY EDWARD DILLON, ) 3:03-CV-00203-ECR-RAM  
)  
Plaintiff, )  
)  
vs. ) ORDER  
)  
WEST PUBLISHING CORPORATION, )  
WEST GROUP and THE THOMSON )  
LEGAL PUBLISHING CORPORATION, )  
BLACK AND WHITE CORPORATION )  
and DOES I through X, )  
inclusive, )  
)  
Defendants. )  
\_\_\_\_\_ )

This case arises out of an employee's termination in violation of the Age Discrimination in Employment Act ("ADEA"). The case has been tried twice to a jury; the second time the only issue presented to the jury was the determination of the amount of back pay damages.

There are three motions now pending before the Court. First is Defendants' Motion (#208) for a New Trial or Remittitur filed on July 23, 2008. Plaintiff filed an Opposition (#218) to the motion on September 16, 2008, to which Defendants filed a Reply (#219) on September 30, 2008. Second is Plaintiff's Motion (#209) To Amend the Judgment and To Add Prejudgment Interest, filed on July 24, 2008. Defendants filed an Opposition (#215) to the motion on August 11, 2008, and Plaintiff filed a Reply (#217) on August 25,

1 2008. Third is Plaintiff's Application (#210) for Fees and Costs  
2 filed on July 24, 2008. Defendants opposed (#214) that motion on  
3 August 11, 2008, and Plaintiff replied (#217) on August 25, 2008.

4 The motions are now ripe, and we will address each in turn.  
5 For the reasons set forth below, Defendants' Motion (#208) for a  
6 New Trial or Remittitur is denied, Plaintiff's Motion (#209) To  
7 Amend the Judgment and To Add Prejudgment Interest is granted, and  
8 Plaintiff's Application (#210) for Fees and Costs is granted in  
9 part and denied in part.

#### 10 11 I. Background

12 The parties are familiar with the background of the case; we  
13 pause only briefly to outline some of the relevant procedural  
14 history. In September 2007, a jury found that Plaintiff Larry  
15 Dillon's employer, West Publishing, unlawfully terminated him in  
16 violation of the Age Discrimination in Employment Act and awarded  
17 him \$1,887,747 in back pay damages. The jury awarded Plaintiff \$0  
18 in front pay. Nevertheless, the jury found that the violation was  
19 "willful," and the Court doubled the back pay award as a result.

20 Following the trial, Defendants West Publishing Corporation  
21 and The Thomson Corporation (collectively "Defendants") argued that  
22 Plaintiff did not timely disclose his damages calculation, and they  
23 moved for a new trial based on this alleged discovery misconduct.  
24 The Court agreed and on January 3, 2008, ordered a new trial as to  
25 the issue of back pay damages only. In addition, the Court found  
26 that Defendants were entitled to judgment as a matter of law with  
27 respect to the "willful" finding. As a result, the Court vacated  
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1 (#143) the judgment on January 4, 2008. The new trial was held in  
2 July 2008, and the jury returned a verdict in favor of Plaintiff in  
3 the amount of \$1,730,041.25 in back pay. Judgment (#206) was  
4 entered accordingly on July 10, 2008.

5  
6 **II. Defendants' Motion for New Trial or Remittitur (#208)**

7 **A. New Trial**

8 Defendants argue first that the Court should order a new trial  
9 because the evidence supporting the back pay award "is false" and a  
10 new trial is needed to "prevent a miscarriage of justice." (D.'s  
11 Mtn. 11 (#208).) Federal Rule of Civil Procedure 59 allows a  
12 district court to grant a new trial "to all or any of the parties  
13 and on all or part of the issues . . . for any of the reasons for  
14 which new trials have heretofore been granted in actions at law in  
15 the courts of the United States." FED. R. CIV. PRO. 59(a).

16 There is no fixed standard to apply when granting or denying a  
17 new trial; instead, the decision is within the discretion of the  
18 district court and "varies with the grounds for which relief is  
19 sought." 12 JAMES WM. MOORE, FEDERAL PRACTICE § 59.13[1] (3d ed. 2008)  
20 (hereinafter "FEDERAL PRACTICE"). While a district court looks for  
21 "substantial evidence" to support the verdict for judgment as a  
22 matter of law, Transgo, Inc. v. Ajac Transmission Parts Corp., 768  
23 F.2d 1001, 1013-1014 (9th Cir. 1985), in a motion for a new trial,  
24 a court is left to its own discretion, Hanson v. Shell Oil Co., 541  
25 F.2d 1352, 1359 (9th Cir. 1976) (to avoid a miscarriage of justice,  
26 a trial court may grant a new trial "even though the verdict is  
27 supported by substantial evidence").

1 Typical grounds for granting a new trial include that the  
2 verdict is "against the clear weight of the evidence, that damages  
3 are excessive, that the trial was not fair, or that substantial  
4 error occurred in the admission or rejection of evidence or the  
5 giving or refusal of instructions." 12 FEDERAL PRACTICE § 59.13[1]  
6 (citing Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940));  
7 e.g., Minthorne v. Seeburg Corp., 397 F.2d 237 (9th Cir. 1968)  
8 (allowing new trial because size of the verdict was against the  
9 weight of the evidence). In general, a court will disturb a jury  
10 verdict only in extreme circumstances, such as where there is an  
11 "abuse of the jury's function" or to prevent "manifest injustice."  
12 12 FEDERAL PRACTICE § 59.13[2][a]; e.g., In re First Alliance Mortgage  
13 Co., 471 F.3d 977, 1001 (9th Cir. 2006) ("Generally, a jury's award  
14 of damages is entitled to great deference, and should be upheld  
15 unless it is 'clearly not supported by the evidence' or 'only based  
16 upon speculation or guesswork.'") (quoting L.A. Mem'l Coliseum  
17 Comm'n v. Nat'l Football League, 791 F.2d 1356, 1360 (9th Cir.  
18 1986)). A court should not simply substitute its findings for  
19 those of the jury. 12 FEDERAL PRACTICE § 59.13[2][f][iii].

20 Defendants argue that the Court should order a new trial  
21 because Plaintiff claimed purportedly unsubstantiated losses on his  
22 tax returns that he used to offset his income. These losses  
23 lowered the amount of his mitigating income and thus increased the  
24 amount of claimed back pay. (D.s' Mtn. 11-12 (#208).) The losses  
25 were documented by Plaintiff's Schedule Cs, which were subject to  
26 limited verification during the retrial. Plaintiff's accountant  
27 did not testify – the Court denied Defendants' request to depose  
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1 the accountant before the retrial – and Plaintiff did not produce  
2 supporting documentation. Plaintiff responds that Defendants made  
3 these arguments to the jury, and still the jury found in  
4 Plaintiff's favor. (P.'s Opp. 3 (#218)). Further, Plaintiff  
5 contends that Defendants could have subpoenaed Plaintiff's  
6 accountant, but elected not to do so, and that Plaintiff testified  
7 as to the veracity of the Schedule Cs.

8 In particular, Defendants' objection is that Plaintiff should  
9 have used his total income (Tax Form 1040 line 22), not his total  
10 wages (line 7), as the subtrahend in his damages calculation. Had  
11 Plaintiff followed Defendants' method of calculation, then  
12 Plaintiff would not have deducted the \$264,545 in Schedule C  
13 expenses. This would increase Plaintiff's income by that amount  
14 and lower his award of back pay by that amount. In the  
15 alternative, Plaintiff could have documented better the Schedule C  
16 expenses.

17 Ordering a new trial is not necessary. There is nothing other  
18 than Defendants' assertion supporting the notion that Plaintiff's  
19 tax returns were false. The jury chose to believe that Plaintiff's  
20 tax returns were true. Defendants presented their argument to the  
21 jury, and the jury rejected their claims. Nothing in the record  
22 demonstrates that Plaintiff's evidence was false, nor does anything  
23 in the record indicate that a new trial is needed to prevent a  
24 miscarriage of justice.

25 Defendants next argue that Plaintiff failed to mitigate his  
26 damages by quitting his job with CCH in 2005, turning that job over  
27 to his wife, and then deducting her income from his in his damages'

1 calculation for that year. (D.s' Mtn. 13 (#208).) This argument,  
2 too, was rejected by the jury. The jury was instructed that, while  
3 Plaintiff had a duty to mitigate his damages and that Defendants  
4 were "not required to compensate the plaintiff for avoidable  
5 damages," Defendants had the burden to prove any reduction in an  
6 award of back pay by a preponderance of the evidence. (Instruction  
7 No. 28 (Order #207).) Instruction Number 28 was given by  
8 stipulation, without modification. The jury found, based on the  
9 evidence before it, that Defendants did not prove that Plaintiff  
10 did not properly mitigate his damages.

11 Before the first trial, Defendants had the opportunity to  
12 gather evidence relating to the issue of damages. They chose not  
13 to follow that path and instead focused on the liability issue.  
14 Plaintiff has twice presented his theory of damages to different  
15 juries; both times the juries came back with similar awards. This  
16 does not appear to be an extreme case where the Court should  
17 disturb the jury's verdict.

#### 18 **B. Remittitur**

19 Failing the receipt of a new trial, Defendants contend that  
20 the Court should order remittitur because the damage award is  
21 excessive. (D.s' Mtn. 13 (#208).) As an alternative to ordering a  
22 new trial, a trial court may offer to a party the opportunity to  
23 accept a lower verdict. Denholm v. Houghton Mifflin Co., 912 F.2d  
24 357, 361 (9th Cir.), cert. denied 501 U.S. 1212 (1990). This  
25 remittitur alternative is appropriate "where no clear judicial  
26 error or pernicious influence can be identified, but where the  
27 verdict is so large as to shock the conscience of the court."

1 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, 11 FEDERAL PRACTICE &  
2 PROCEDURE § 2815 (2d ed. 1995) (hereinafter "WRIGHT & MILLER") (quoting  
3 Abrams v. Lightolier, 841 F. Supp. 584 (D. N.J. 1994)); BMW of N.  
4 Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) (reducing punitive  
5 damage award). Whether a new trial or remittitur is appropriate is  
6 "committed to the sound discretion of the trial court." 11 WRIGHT &  
7 MILLER § 2815. The court may not, however, arbitrarily reduce an  
8 award. See Kennon v. Gilmer, 131 U.S. 22, 29-30 (1889).

9 Defendants aver that the proper amount of remittitur is the  
10 maximum award sustained by the evidence. (D.s' Mtn. 14 (#208).)  
11 The basis for their claim, however, is simply that the jury's award  
12 was excessive in light of the Schedule C deductions. Defendants  
13 cross-examined Plaintiff at length with respect to his tax returns,  
14 and the jury found that Plaintiff testified credibly. In light of  
15 this testimony, the jury came up with an appropriate calculation.  
16 The jury's award, while significant, does not shock the conscience  
17 of the Court.

### 18 **C. Alter the Judgment**

19 Defendants next argue that the Court should alter or amend the  
20 judgment under Federal Rule of Civil Procedure 59(e) because the  
21 Court made an initial decision that was manifestly unjust. (D.s'  
22 Mtn. 15 (#208).) To wit, Defendants contend that the Court should  
23 not have denied Defendants discovery of Plaintiff's accountant,  
24 Plaintiff's wife, Plaintiff's recent employers, and Plaintiff's  
25 supporting documentation for his Schedule Cs before the retrial.

26 As explained above, Defendants had the opportunity to depose  
27 Plaintiff's accountant, Plaintiff's wife, Plaintiff's employers,  
28

1 and to gather information with respect to damages before the first  
2 trial. The Court gave Defendants a second bite at the apple after  
3 determining that Plaintiff engaged in discovery misconduct by not  
4 disclosing fully his theory of damages. At the retrial, Defendants  
5 were allowed to cross-examine Plaintiff extensively on all of the  
6 above issues; the jury believed Plaintiff's version of events.  
7 While Plaintiff could have done a better job of documenting his  
8 Schedule C deductions, nothing in the record indicates that this  
9 Court should alter the jury's award of over \$1.7 million.  
10 Defendants' theories were rejected by the jury, and the Court will  
11 not disturb the jury's conclusions.

12  
13 **III. Plaintiff's Motion To Amend the Judgment To Add Prejudgment**  
14 **Interest (#209)**

15 Plaintiff seeks to amend the judgment in this case to allow  
16 prejudgment interest on the back pay award in the amount of  
17 \$310,141. Plaintiff has attached to his motion a calculation that  
18 adjusts the award for prejudgment interest on a compound rate, so  
19 that interest of subsequent time periods accrues on interest from  
20 prior time periods.

21 An award of prejudgment interest for an ADEA claim is left to  
22 the district court's discretion. Kelly v. Am. Std., Inc., 640 F.2d  
23 974, 982 (9th Cir. 1981). In Kelly, the District Court for the  
24 Eastern District of Washington awarded an ADEA plaintiff  
25 prejudgment interest on the plaintiff's back pay award. Id. at  
26 976. On appeal, the Ninth Circuit affirmed. Id. at 982-83. The  
27 Ninth Circuit reasoned that the ADEA is enforced through the

1 "remedial rights and procedures of the Fair Labor Standards Act  
2 (FLSA)," id. at 977-78, and that FLSA law was "directly applicable"  
3 to ADEA, id. at 982. Thus, the court held that to assure  
4 "equitable relief under the ADEA, the loss of use of [back pay  
5 wages] . . . should be compensated by payment of interest." Id.;  
6 Criswell v. W. Airlines, Inc., 709 F.2d 544, 557 (9th Cir. 1983)  
7 (holding that "the district court properly exercised its equitable  
8 powers by awarding the [ADEA] plaintiffs prejudgment interest on  
9 their back pay awards"), aff'd 472 U.S. 400 (1985). It seems  
10 appropriate to award Plaintiff prejudgment interest to compensate  
11 him for his loss of use of wages.

12 Interest on money judgments in civil cases "shall be  
13 compounded annually." 28 U.S.C. § 1961(b). The rate shall be  
14 "equal to the weekly average 1-year constant maturity Treasury  
15 yield, as published by the Board of Governors of the Federal  
16 Reserve System, for the calendar week preceding the date of  
17 judgment." Id. § 1961(a) (footnote omitted). Judgment in this  
18 case was entered (#206) on July 10, 2008. The weekly average 1-  
19 year constant maturity Treasury yield, as of July 4, 2008, was 2.35  
20 percent. See [http://www.federalreserve.gov/releases/h15/data/](http://www.federalreserve.gov/releases/h15/data/Weekly_Friday_/H15_TCMNOM_Y1.txt)  
21 [Weekly\\_Friday\\_/H15\\_TCMNOM\\_Y1.txt](http://www.federalreserve.gov/releases/h15/data/Weekly_Friday_/H15_TCMNOM_Y1.txt).

22 Contrary to Plaintiff's calculation, we do not deem it  
23 appropriate to calculate the amount by compounding lost income on a  
24 monthly basis; rather, the amount should be compounded annually.  
25 We also note that Plaintiff's proposed "lost income" calculations  
26 total \$1,729,981.00 even though the jury returned a verdict of  
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1 \$1,730,041.25.<sup>1</sup> Nevertheless, the individual annual lost income  
2 amounts proposed appear to be reasonable, so the Court will use  
3 those individual allocations along with the rate of 2.35 percent,  
4 compounded annually. Thus, Plaintiff will be entitled to  
5 \$182,910.55 in prejudgment interest.

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7 **IV. Plaintiff's Application for Fees and Costs (#210)**

8 Attorney fees are authorized under the ADEA. Kelly, 640 F.2d  
9 at 986. Defendants do not dispute this, but take issue with the  
10 amount Plaintiff's counsel – Mr. Rumph – seeks for additional fees  
11 incurred after the first trial and for legal services rendered by  
12 Plaintiff's prior counsel.

13 Defendants argue that they should not be required to pay for  
14 fees associated with the new trial because the new trial was  
15 granted due to Plaintiff's discovery misconduct. We agree. The  
16 first trial judgment was entered on September 21, 2007, and the new  
17 trial was granted on January 3, 2008. Accordingly, the attorney  
18 fee award will be reduced to exclude the period following January  
19 3, 2008. Mr. Rumph's records indicate that he spent 116.2 hours on  
20 the case after January 3, 2008. At his hourly rate of \$325, the  
21 award should be reduced from the claimed amount of \$185,510 by  
22 \$37,765 for a total of \$147,745. Similarly, Plaintiff will not be

23  
24 <sup>1</sup>Plaintiff's calculation is based on the following losses. 1999:  
25 \$93,435. 2000: \$236,413. 2001: \$213,700. 2002: \$154,480. 2003:  
26 \$161,373. 2004: N/A. 2005: \$205,303. 2006: \$269,053. 2007:  
27 \$264,149. 2008: \$132,075. Total: \$1,729,981. Plaintiff was  
terminated in September 1999; therefore, the award for interest for  
1999 should be calculated on September through December only.  
Judgment was entered on July 10, 2008, so the award for interest for  
2008 should be calculated from January 1 through July 10, 2008.

1 entitled to costs/additional expenses – as outlined in his  
2 application (#210) – associated with the new trial.

3 Defendants next argue that they should not have to pay the  
4 \$14,549.73 that Plaintiff owes to his prior counsel because the  
5 claims of prior counsel were abandoned at the summary judgment  
6 stage. In civil rights actions, the Ninth Circuit has counseled  
7 that lower courts follow a two step inquiry in determining whether  
8 to award attorney's fees when a plaintiff did not succeed on all of  
9 his claims:

10 First, the court asks whether the claims upon which the  
11 plaintiff failed to prevail were related to the  
12 plaintiff's successful claims. If unrelated, the final  
13 fee award may not include time expended on the  
14 unsuccessful claims. If the unsuccessful and successful  
15 claims are related, then the court must apply the second  
16 part of the analysis, in which the court evaluates the  
17 "significance of the overall relief obtained by the  
18 plaintiff in relation to the hours reasonably expended."  
19 If the plaintiff obtained "excellent results," full  
20 compensation may be appropriate, but if only "partial or  
21 limited success" was obtained, full compensation may be  
22 excessive.

17 Thorne v. City of El Segundo, 802 F.2d 1131, 1141 (9th  
18 Cir. 1986) (quoting Hensley v. Eckerhart, 461 U.S. 424,  
435 (1983)).

19 Here, the claims that Plaintiff abandoned were not related to  
20 his successful claims.<sup>2</sup> The abandoned claims alleged theories of

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21  
22 <sup>2</sup>Mr. Rumph has previously conceded this point. Shortly after  
23 changing attorneys, Plaintiff's prior counsel sought to force  
24 Plaintiff to pay the prior firm for services rendered by filing a  
25 Motion (#44) to Enforce Judgment/Attorney Lien. Mr. Rumph opposed  
26 (#46) the motion in behalf of Plaintiff, where he indicated that the  
27 prior firm's work was not "necessary." (Opp. 1 (#46).) In addition,  
28 he argued that the "applicant firm initiated this lawsuit with claims  
that have now been abandoned." (*Id.*) Mr. Rumph also recognized that  
prior counsel did not pursue the ADEA claim and that this "was a huge  
issue" later in amending the complaint. In sum, Mr. Rumph argued that  
Plaintiff's prior counsel's work was neither necessary nor relevant  
to the subsequently added and successful ADEA claim.

1 recovery independent from a claim of age discrimination, such as  
2 civil conspiracy, tortious constructive discharge in violation of  
3 public policy, breach of contract, breach of the implied covenant  
4 of good faith and fair dealing, and intentional infliction of  
5 emotional distress. Thus, Defendants should not bear the costs of  
6 Plaintiff's prior counsel.

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